The
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THE BAR ASSOCIATION BULLETIN

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"Particular Matters in Pleading and Practice Before the Presiding Judge of the Superior Court"

(Continued from Last Issue)

By JUDGE ELLIOTT CRAIG

[*For the purpose of this printing, the paper has been reduced to direct legal matters presented.*—EDITOR.]

I have found from experience that the mailing records of the County Recorder's office are an excellent means of locating the address of defendant through the mailing return address on the instrument by which his record interest in real property was created. In sending letters in effort to locate defendants I recommend registered mail with return receipt requested.

The matter of judgments in rem and judgments in personam under service by publication I will not discuss further than to refer to the leading case of Pennoyer vs. Neff, 95 U. S. Supreme Court Reports 714, holding in substance that a court of one state cannot by publication acquire jurisdiction to render a personal judgment against a citizen of another state; generally speaking the judgment is in rem only, i. e., affecting property or status of persons within the state or to be satisfied out of property brought under the control of the court by attachment, receivership or other proper method. Our Supreme Court has definitely stated that the attachment may be levied at any time before completion of the service by publication, but not after such completion.

On going into the department of the Presiding Judge last year I found that in many instances the summons was filed at the time of or even before the obtaining of the order for publication of summons. I held up judgments in a few quiet title actions, etc., on publication of summons and had several able attorneys brief the matter. We found that the matter has never been directly passed on by the Supreme Court; but why worry the Presiding Judge? The only safe method is to hold the summons as an outstanding process pending the full period of publication. I therefore so recommend.

The nearest approach to cases in point which we could find on matter of effect of summons being returned before or after issuance of order for publication and before completion of publication are cases where the appeals were on the judgment roll and the Supreme Court indulged in the presumption that the trial court ordered the summons withdrawn after original filing, for further service by publication on the defendants affected thereby, saying in Rue vs. Quinn, 137 Cal. 651:

> "The authority of the Court to order service of the summons by publication is not taken away by reason of the fact that the summons has been previously returned to the Clerk's office. The provision for an alias summons does not impair the power of the Court to authorize the summons to be withdrawn for further service or for service by publication."

This and other cases hold that a summons may be withdrawn by order of court for further service, but nowhere, in the rather extensive but still possibly incomplete search which we made, could we find a case covering the point of effect of service either personally or by publication of a summons theretofore returned and filed and actually on file at time of service, all cases apparently turning on the presumption to sustain judgment that the Court ordered the summons withdrawn for a further service.

Section 446, C. C. P., reads in part:

"Every pleading must be subscribed by the party or his attorney."

Let us next turn to amendments of pleadings. Section 472 C. C. P., covers amendments, of course. This is statutory and please do not take the time of the Presiding Judge in asking for his order that such amendment may be filed. The statutory law gives you the right as of course. Section 473, C. C. P., provides, in part, for amendment with consent of court and without notice in matters of "adding or striking out the name of any party or by correcting a mistake in the name of a party, or a mistake in any other respect." These are proper amendments to present to the Presiding Judge for consent to filing. However, section 473, C. C. P., further provides:

"The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars."

Please note here the requirement of "after notice to the adverse party," and bear in mind Section 1005, C. C. P., on "Notice of motion, when to be given," which contains the 5 days, etc., time requirement on notices. Hence, if you cannot amend of course and proposed amendment goes further than mere adding, striking or change of name or correcting of mistake, your proper procedure is by motion duly served and noticed for hearing in the law and motion department (present Dept. 15). Do not bother the Presiding Judge with these as they are not ex parte matters.

A restraining order should be issued only on direct averments of facts and not on mere information and belief, except to the extent that the belief is a reasonable conclusion to be drawn from the facts directly stated. In the matter of bonds on restraining orders, it is my understanding that Section 529, C. C. P., applies (note remarks thereon to follow); its provisions require a bond on an injunction except "when it is granted on the application of the people of the state, a county, or a municipal corporation, or a wife against her husband." Let me here emphasize that "a husband against his wife" is omitted from the exceptions and therefore I believe the law requires a bond from the husband on restraining order or other injunctive order, even in a divorce action.

In San Diego Water Co. vs. Pacific Coast Steamship Company, 101 Cal. 216, the Supreme Court said:

"The restraining order is a restraint of the same nature as an injunction, but the statute not only does not designate it as an injunction but discriminates between it and an injunction. It is a restraint pending the consideration of the Court as to whether the party is entitled to a preliminary injunction. The statute does not expressly require an undertaking as a condition for a restraining order, although this Court has said one ought to be required."

See also Newmann vs. Moretti, 146 Cal. 31.

In presenting an undertaking on a restraining order please see that it says "restraining order" and not "that plaintiff is about to apply or has applied for an injunction." Such variance is fatal—see Byam vs. Cashman, 78 Cal. 525.

Section 545, C. C. P., refers to examination of garnishee before judgment.

Section 714, C. C. P., refers to examination of judgment debtor after execution returned unsatisfied and Section 715, C. C. P., refers to same after execution issued and before its return. A party cannot be examined in the nature of a general discovery as to his property prior to judgment. This is held in ex parte Rickelton, 51 Cal. 316, which case was decided in 1876 and has never been since cited according to Shepard's Citater. Said Section 714 reads:

"After execution is returned unsatisfied in whole or in part", also "but no judgment debtor must be required to attend before a judge or referee out of the county in which he resides, or in which he has a place of business."

Please cover these essentials in the affidavit or by presentation of the files so that the Presiding Judge may know when signing the order that it will not be served in any attempt to require the attendance of judgment debtor contrary to the code provision. When proceeding is under Section 715, an affidavit is required.

Under the chapter concerning Actions to Determine Conflicting Claims to real property, etc., Section 739, C. C. P., reads:

"If the defendant in such action disclaims in his answer any interest or estate in the property, or suffer judgment to be taken against him without answering, the plaintiff cannot recover costs."

This means that in default quiet title actions, even though defendant does not disclaim, costs can not be recovered against him, so please do not include the provision for costs in preparing such judgments.

Section 1045, C. C. P.:

"If an original pleading or paper be lost, the court may authorize a copy thereof to be filed and used instead of the original."

Section 408, C. C. P.:

"If the summons is returned without being served on any or all of the defendants, or if it has been lost, the clerk upon demand of the plaintiff, may issue an alias summons", etc.

Referring to the summons particularly, because more summonses are lost than all other "pleadings or papers" combined, if summons is lost after service, present affidavit and order to substitute copy of the same to the Presiding Judge and on obtaining and filing order you may then have return of service of summons made upon the copy of summons without necessity of re-serving. If summons is lost before service you should have alias summons issued on affidavit filed with the clerk and have alias summons served and return made thereon. In cases of service of summons after amended complaint filed as of course before service of summons, please return summons to the clerk and have a new summons on amended complaint issued. This is particularly necessary in cases of publication as original summons says to answer the complaint and does not refer to amended complaint.

It is true that in Dowling vs. Comerford, 99 Cal. 204, the Supreme Court says:

"Where an amended complaint is filed before the defendants are brought into court and amended summons is issued which refers to the complaint on file and not in terms to the amended complaint, the amended summons is not misleading nor is such reference uncertain or ambiguous; the amended complaint naturally takes the place of the former one and becomes the complaint."

But here a new summons was actually issued after the filing of the amended complaint. Let us avoid borderline complications by being clearly correct.

On the general subject of Contempt of Court, I shall refer only to one phase which comes up daily. Section 1211, C. C. P., provides in part in substance that when a contempt is committed out of the presence of the Court, an affidavit of the facts constituting the contempt shall be presented to the court or judge. It is jurisdictional that it be made to appear in such affidavit or otherwise of record in the case that the party to be cited had knowledge of the court order or judgment at time he violated same. (Lake vs. Superior Court, 165 Cal. 182; Frowley vs. Superior Court, 158 Cal. 220). This is customarily shown by stating in the affidavit according to the facts either that the party was personally present in court when the order was made or was served thereafter with a copy thereof. Dozens of orders to show cause in re contempt for non-payment of alimony were refused last year until the affidavits were supplemented by this jurisdictional fact, or as was done in many instances, the files of the case were brought in and the order signed when it appeared from the signed order or from the certified copy of the minute order in the files that the party was personally present. Covering the matter by affidavit is the more convenient method. Let me here call your attention to the fact that in cases of unpaid alimony it is a proper and recognized procedure to enforce payment by execution. The execution is issued by the clerk upon order of the Presiding Judge and the Presiding Judge signs the order upon proper showing to him by affidavit of the existence of the order for payment and the amount unpaid.

It is held in People vs. Durrant, 116 Cal. at 209,

"While a contempt proceeding for convenience is presented in the cause out of which it grows, it is a separate and distinct matter and no part of the original case."

"The court takes judicial notice of the proceedings in an action pending before it, upon a proceeding therein for contempt." *Ex parte* Ah Men, 77 Cal. 198.

"The court takes cognizance of the pendency of the main cause and there is no necessity of settting forth in the affidavit that fact or the provisions of the order which has been violated." Mitchell vs. Superior Court, 163 Cal. 423.

My conclusion is that since the court takes judicial notice of the pendency of the main action and of the contents of the order as made, the court will take judicial notice of a recital in such order that the defendant was present in court when the order was made. My recommendation, however, is to eliminate all chance for an "argument" by covering the point in the affidavit.

Referring to dissolution of corporations, Section 1228, C. C. P., provides in part,

"that all claims and demands against the corporation have been satisfied and discharged."

Permit me to remind you that this prerequisite to dissolution should be definitely ascertained by the attorney before filing the petition, and that it includes payment of *both* installments of the state franchise tax as well

as the state license tax, also that it includes federal income tax and that it includes release from assigned leases and many other things which are frequently discovered on questions by the presiding judge at time of hearing, thereby holding up the proceeding. Tax receipts are a most satisfactory means of showing tax payments.

On hearing of petition for change of name of corporation, the presiding judge meets with but one frequent trouble. This is on the matter of certificate of the Secretary of State as to availability of the proposed name as required by Sec. 1278 C. C. P. An attorney writes to the Secretary of State to inquire as to the availability of the name and the Secretary of State sends back a reply in the form of a printed letter, stating the name to be available, if such be the fact; and attorneys do frequently offer such letters in lieu of the certificates. The law requires the certificate and the letter is not sufficient.

In the matter of taking the deposition of a party to an action Section 2021 C. C. P. permits it to be done "at any time after service of the summons or the appearance of the defendant."

This is a jurisdictional prerequisite to the Presiding Judge signing an order for subpoena to issue requiring such party to appear and it must appear either by affidavit or from the files, preferably by affidavit.

I next desire to discuss the matter of temporary alimony in actions for annulment of marriage. In casting about for authorities on this subject I found the following which is taken from 16 Cal. Juris, page 942:

> "Of course no permanent alimony may be allowed where a decree annulling the marriage is rendered, the effect of such decree, when final, being to declare the marriage a nullity as of the date it was contracted in which case all ground for a claim on the part of the woman for support by the man disappears. (Citing Millar vs. Millar, 175 Cal. 797.)"
>
> "With the exception of a few classes of marriages that are expressly declared illegal and void ab initio by the code, a marriage, though voidable, is to be treated for all purposes as valid until annulled by decree of court, upon direct attack. So even during the pendency of an action by a husband to annul a marriage. where from the grounds alleged it appears that the marriage is at most merely voidable, a *defendant* woman is entitled to be treated as the wife of the man. And it is proper to award her temporary alimony pending the outcome of the litigation, and suit money to enable her to present her defense." (Citing Dunphy vs. Dunphy, 161 Cal. 87.)

From the foregoing and the cases supporting the same it is clear that it is proper to issue an order to show cause in re temporary alimony when requested by defendant wife in an action by husband to annul a voidable marriage but not proper if the marriage be void but I cannot find any case in California directly in point on matter of allowing temporary alimony to a plaintiff wife alleging the marriage to be voidable and seeking to have it so declared ab initio.

My general understanding of the situation prior to recent investigation was in substance that a wife might have temporary alimony and suit money to defend against annulment of a voidable marriage but that where she is the plaintiff claiming and pleading the invalidity of the marriage she is not entitled thereto. After my recent investigation I have no definite opinion as to this latter portion of the statement.

In 26 L. R. A. (N. S.) 500 I found the following:

> "In the absence of controlling statute, the following general rules are fairly deducible:
>
> "(1) Where the husband sues for annullment, and the wife seeks to sustain the validity of the marriage, alimony pendente lite will be allowed.
>
> "(2) Where the wife sues for annullment, and the husband's fraud occasioned the bringing of the suit, temporary alimony will be allowed.
>
> "(3) Where the wife sues for annullment because of an incapacity known to her at the time of the marriage, she will not be allowed temporary alimony."

Section 581 C. C. P. in reference to dismissal of action provides that plaintiff may dismiss by written request to the clerk filed with the papers in the case at any time before the trial provided affirmative relief is not sought by defendant or counter claim set up. This expression "at any time before the trial" has been passed upon by our Supreme Court in MacDermot vs. Grant, 181 Cal. 332, as follows:

> "Dismissal before the trial means dismissal before submission, and before the court trying the case without a jury has taken it under advisement after the close of the evidence and argument."

and said section further provides for dismissal by either party upon the written consent of the other. The reason for directing your attention to this matter is to emphasize the fact that after submission of the matter to the court for decision the action may no longer be dismissed by plaintiff alone and can be dismissed by the parties only upon the written consent of all parties thereto.

Message of the Los Angeles Ch of t of Certified A Acc

IN NEARLY every state in the Uni the la to examine the books of the corpor he inte minority stockholder; and in small conc privile less a real safeguard. But corporations ecuriti today have increased vastly in size, so t books average stockholder. Having the same , he fi to benefit by it.

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Executives of well-managed Americ oration American custom, which would give t ty stoc vent misunderstanding and many harmf versies properly accredited accountant, outside anizati tually give the minority stockholder wh esent l in doing.

of the California State Society Accountants

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curities are broadly held by the public
books cannot be "easy reading" to the
, he finds himself practically powerless

ion must furnish each of its stockholders
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edly gives the minority stockholder the
information in intelligible form, instead

rations should welcome a change in the
ty stockholder information and thus pre-
versies. A balance sheet certified by a
nization of the corporation, would ac-
esent law intended, but does not succeed

Reports of Committees

[ED. NOTE—*The President and Board of Trustees are anxious for all committees to function with maximum efficiency, and for the members of the Association to be fully informed as to the activities of the committees. To this end, each chairman is requested to furnish the Editor with minutes of all meetings of his committee for publication in the Bulletin.*]

Committee on Pleading and Practice

Pursuant to the call of Chairman Fred N. Arnoldy, the Committee on Pleading and Practice met at the office of the chairman on May 24th, 1926, Mr. Arnoldy presiding.

The following members of the committee were present: Fred N. Arnoldy, E. S. Williams, George H. Gobar, H. B. Cornell, Judge Charles D. Ballard, Judge Burtin A. Weyl, and Henry L. Knoop.

The chairman read a communication from Eugene Overton, President of the Los Angeles Bar Association, outlining the duties and functions of this committee. The letter was ordered filed as a part of the minutes of the meeting.

Thereupon Henry L. Knoop was elected Secretary, and assumed his duties.

The Secretary read a letter from Adolph B. Rosenfield, wherein the latter outlined his views as to the work of the committee, and a general discussion followed. The letter was ordered filed as a part of the minutes of the meeting.

On motion of Judge Ballard, seconded by Judge Weyl, and carried by unanimous vote, the chairman appointed a committee of three, to-wit: Messrs, Weyl, Williams and Knoop, to consider particular amendments to the Codes, relative to pleading and practice. The committee was instructed to report in writing at the next meeting.

It was moved by Mr. Gobar that the committee hold a regular meeting on the next to last Tuesday of every month at 7:30 p. m. The motion was seconded by Judge Weyl, and being put to a vote, was carried.

Judge Ballard was requested to be prepared to suggest a method of education in the matters of pleading and practice at the next meeting.

Mr. Charles L. Nichols, who attended the meeting as a representative of the Los Angeles Bar Association, told the members of the committee that the pages of the Bar Association Bulletin were open to the committee for reports and good articles by the members.

HENRY L. KNOOP, *Secretary.*

Special Membership Committee

May 25, 1926

Present: Judge Bishop, Judge Baird, Miss Yale, Mr. Sproul, Mr. Bodkin, Mr. Case, Mr. Beardsley, Mr. Nichols, Mr. Brown, Mr. Redwine, Miss Norman; Chairman Bishop, presiding.

Upon motion duly made, seconded and carried, the following recommendations to the Board of Trustees of the Los Angeles Bar Association were adopted:

1. That the Board of Trustees of the Los Angeles Bar Association adopt a sliding scale of dues incident to membership in the Association, namely, that all new members admitted to membership after the first half of the current year, shall be required to pay a proportionate share of dues for the entire year, the exact amount thereof to be determined upon by the said Board of Trustees.

2. That the Board of Trustees of the Los Angeles Bar Association adopt the policy that when members who have been suspended for non-payment of dues apply for reinstatement to membership, they shall be required to pay delinquent dues for one year only, together with dues for the current year, upon such reinstatement.

3. That the Board of Trustees of the Los Angeles Bar Association adopt the policy that all attorneys admitted to practice law upon examination by the State Board of Bar Examiners be invited to join the Los Angeles Bar Association, and that to this end a member of the Board of Trustees or of this committee, or the nominee thereof, shall attend before the admitting court and extend such invitation.

Furthermore, that such newly admitted attorneys be required to pay no dues for membership in the Association provided they accept such membership during the year in which they are admitted to practice; also, that for the year next following the year in which they are admitted to practice, such newly admitted members shall pay only one-half of the regular dues.

CHAS. L. NICHOLS, *Acting Secy.*

Program of Meeting of Judicial Section of California Bar Association

JUNE 18 and 19, 1926

Hotel Alexandria, Los Angeles

Welcome . . . . . HON. ALBERT LEE STEPHENS

Proposed Legislation for Conference of Judges . . . . . HON. J. R. WELCH

Administration of Civil Justice . . . . . HON. HUGH HENRY BROWN

Retirement and Service Thereafter of Justices and Judges of Courts of Record as Proposed by Assembly Constitutional Amendment No. XXV (Stats. 1925, p. 1382)

HON. WM. H. WASTE

Responsibility of the Bar to the Public in the Selection of Judges . EUGENE OVERTON, ESQ.
President, Los Angeles Bar Association

Legislation to Make Each Judicial Vacancy a Separate Office for Election Purposes
HON. FRANK C. COLLIER

Amelioration of the Work of the Justices of the Upper Courts HON. CHAS. A. SHURTLEFF

Elimination of Delays and Waste of Time Before and During Trial . HON. GUY R. CRUMP

The Judicial Council as Proposed by Senate Constitutional Amendment No. XV (Stats. 1925, p. 1369).

[NOTE—*This meeting is the result of the efforts of John Perry Wood, Esq., Chairman, and Hon. Harry A. Hollzer, Secretary of the Section. The membership of the Section comprises all Justices and Judges, Ex-Justices and Ex-Judges of Courts of Record of the State who shall enroll as members. Those who have not enrolled may do so by letter addressed to the Secretary, or at the time of the above meeting of the Section.*]

American Bar Association Meeting

Denver, Colorado, July 14-15, 1926

If a sufficient number of Los Angeles attorneys and their families desire to attend this meeting, the railroad company will provide a special car for their comfort and convenience, or a special train if the number will justify.

The summer vacation round-trip fare is $67.30, and may be routed so as to go one way and return another. The trip should be planned so as to arrive in Denver not later than Tuesday, July 13th.

The program of the meeting and hotel accommodations may be found in the American Bar Association Journal.

If interested, send in your name, address and telephone number to the County Law Library, and a representative of the railroad company will give you further information.

Book Reviews

Outlines of California Criminal Procedure by Charles W. Fricke, LL.M., J.D., Hall Publishing Company, Los Angeles, California, 1926.

This is a timely and valuable manual of two hundred and seventy-one pages by an author who is thoroughly familiar with the subject and who, by reason of long experience, especially in the District Attorney's office of Los Angeles County, is well qualified for the task.

The manual is an epitome of Criminal Procedure, adapted particularly to the law of California. The author has endeavored to make this treatise as concise as practicable, the treatment of the various topics being proportioned to their relative importance.

Some of the more important topics covered are Jurisdiction, Arrest, Amendments of Pleadings, Pleas, Motions, Trial by Jury, New Trial, Probation, Juveniles Charged with Crime, and a section on Evidence embracing some forty pages.

The method used in the treatment of the various topics is to cite the pertinent Code Sections and then to follow with citations of cases decided by the California Courts.

There is a well organized Appendix containing forms for charging felonies, followed by complete alphabetical Index of the Book.